

Advance Directives

The term “advance directives” refers to a living will declaration and/or a durable power of attorney for health care. Members may execute an advanced directive for health care to give direction to health care providers for the provision of services when they can no longer make health care decisions for themselves.

A living will is a document that explains, in writing, the member’s wishes regarding his/her health care should he/she have a terminal condition (as defined by Arizona law). A durable power of attorney for health care allows the member to make another person responsible for making decisions for him/her if he/she is unable to do so. It allows health care decisions to be made by the “proxy or alternative decision maker.”

MIHS-HP respects the member’s right to accept or refuse medical care and encourages members to participate in health care decisions. The existence of an advance directive is not a required prior to giving care. **A member should provide a copy of the advanced directive to his/her assigned PCP to be noted in the member’s medical record.**

Advanced directives from another state or executed before September 19, 1991, will be recognized if in compliance with Arizona law.

The PCP is not required to comply with an advanced directive if to do so is contrary to the physician’s religious beliefs or moral convictions. In this event, the PCP shall promptly transfer responsibility for the care of the terminal client to another physician who will carry out the advanced directive.

The advance directive of a qualified member known to the attending physician to be pregnant shall be given no force or affect as long as the fetus could develop to the point of live birth with continued application of life sustaining procedures.

Information regarding advanced directives is available to MIHS-HP members provided through Member Services at 602/344-8760.

Mental Health Care Power of Attorney

During the last legislative session, the Governor signed into law Senate Bill 1146, creating a new advance directive called a mental health care power of attorney.

MIHS-HP providers should update their advance directive policies and procedures to incorporate the mental health care power of attorney and should educate their staff concerning the new policy and procedures. As well, providers should update their community education material concerning advance directives to include the new mental health care power of attorney.

Frequent Asked Questions (FAQs)

What is a mental health care power of attorney?

A mental health care power of attorney is a written statement in which an adult (principal) can appoint another adult (an agent) to make mental health care decisions for the principal. An agent who has accepted the appointment in writing may make these mental health decisions, if the principal is found incapable. “Incapable” means that a licensed psychologist or psychiatrist believes the principal is unable to give informed consent.

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What are the requirements for a valid mental health care power of attorney?

A mental health care power of attorney must meet the following requirements:

1. It must be executed by a principal who is not “incapable”.
2. It must be in writing.
3. It must contain language clearly indicating the principal intent to create a mental health care power of attorney.
4. It must be dated and signed, or marked by the principal. If the principal is physically unable to sign or mark the power of attorney, the notary and each witness must verify on the document that the principal indicated to them that the power of attorney expressed the principal's wishes and the principal intended to adopt the power of attorney at that time.
5. It must be notarized or witnessed in writing by at least one adult who affirms that he or she was present when the principal dated and signed or marked the mental health care power of attorney, and that the principal appeared to be of sound mind and free from duress, fraud or undue influence at that time. The notary or witness may not be a person designated to make medical decisions for the principal or a professional care provider directly involved with providing care to the principal at the time the power of attorney is executed. If it is witnessed or notarized by only one person, that person cannot be related to the principal by blood, marriage or adoption, and cannot be entitled to any part of the principal's estate by will or operation of law.

The mental health care power of attorney may expressly provide that the agent can admit the principal to a Level One behavioral health facility. If so, each paragraph that grants this authority must be separately initialed by the principal at the time the mental health care power of attorney is signed and witnessed.

How is a mental health care power of attorney revoked?

The appointment of an agent is effective until his or her authority is revoked by the principal or by a court order. Unless the mental health care power of attorney contains an express limitation, the principal (even if he or she is “incapable”) may revoke all or any part of the mental health care power of attorney by doing any of the following things:

- Making a written revocation of the mental health care power of attorney or a written statement to disqualify an agent.
- Orally notifying the agent or a mental health care provider.
- Making a new mental health care power of attorney.
- Doing any other act that demonstrates a specific intent to revoke a mental health care power of attorney or disqualify an agent.

Who may be an agent?

An agent cannot be involved directly with the provision of health care to the principal at the time the mental health care power of attorney is signed.

What powers and rights does an agent have?

An agent may make mental health care decisions for the principal only if the principal is incapable. An agent has the same right as the principal to receive information and to review the principal's medical records regarding proposed mental health treatment, and to consent to the disclosure of medical records relating to the treatment.

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An agent's decisions must be consistent with any wishes the principal has expressed in a mental health care power of attorney. If the principal's wishes have not been expressed and are not otherwise known by the agent, the agent must act in accordance with what the agent in good faith believes to be in the principal's best interests.

An agent may consent to admit the principal to a Level One behavioral health facility only if the authority expressly is stated in the mental health care power of attorney. However, a principal may not be admitted to a Level One behavioral facility unless a licensed psychologist or psychiatrist does the following things:

1. Conducts an investigation of the principal's psychiatric and psychological history, diagnosis and treatment needs.
2. Conducts a thorough interview with the principal and the agent.
3. Obtains the agent's informed consent.
4. Makes a written determination that the principal needs an inpatient evaluation or will benefit from care and treatment of a mental disorder, personality disorder, or emotional condition and that the evaluation or treatment cannot be accomplished in a less restrictive setting, and
5. Documents these findings and recommendation in the principal's medical chart.

The Level One behavioral health facility must review the principal's condition and need for admission and must assess the placement every thirty days. The agent must participate in this review if possible.

Does the statute provide immunity?

An agent may not be subjected to either criminal or civil liability for decisions made in good faith or made pursuant to a mental health care power of attorney. However, there is not a specific provision governing immunity for health care providers.

What are you required to do in response to this new law?

Federal law requires Medicare-participating hospitals, skilled nursing facilities, home health agencies, and hospices to provide to all adults, at the time of their admission as inpatients or residents or at their first home visit, written information concerning the patients' rights under state law to make decisions concerning their medical care, including their right to formulate advance directives. This information must tell individuals that complaints concerning advance directives may be filed with the state survey agency (The Arizona Department of Health Services). These federal regulations require providers to update and disseminate amended information no later than 90 days from the effective August 6, 1999. Providers therefore are required to update and disseminate amended information discussing the mental health care power of attorney by November 4, 1999.

The federal regulations also require providers to maintain written policies and procedures concerning advance directives. Providers must provide their policies regarding implementation of patients' advance directives at the time the patient is admitted as an inpatient or resident, or at the first home visit. While the regulation does not require providers to update their policies within 90 days of the effective date of changes in state law, we suggest doing so, so that your policies are consistent with the other information provided to your patients.

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Additionally, the federal regulations require providers to educate staff concerning these policies and procedures. It is suggested that providers inform their medical staff of the new law and provide them copies of the attached mental health care power of attorney, and that education is provided to nurses, admitting personnel and other employees concerned with advance directives.

Finally, providers must provide “community education” regarding advance directives. This material must define what is an advance directive and describe state law, emphasizing that an advance directive is designed to enhance an incapacitated individual’s control over medical treatment. A provider must be able to document its community education efforts.

The Arizona legislature-approved form for mental health care powers of attorney is included. However, the legislature does not prohibit the use of other language or forms, thus providers may adopt this form to the needs of their situation.

Remainder of Page Blank

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MENTAL HEALTH CARE POWER OF ATTORNEY

Statutory Form

I, _____, being an adult of sound mind, voluntarily make this declaration for mental treatment. I want this declaration to be followed if I am incapable, as defined in Section 36-3281, Arizona Revised Statutes. I designate

(include the person's name, address and telephone number) as my agent for all matters relating to my mental health care including, without limitation, full power to give or refuse consent to all medical, surgical, hospital and related mental health care. If my agent is unable or unwilling to serve or continue to serve, I appoint

(include the person's name, address and telephone number) as my agent. I want my agent to make decisions for my mental health care treatment that are consistent with my wishes as expressed in this document, or if not specifically expressed, as are otherwise known to my agent.

If my wishes are unknown to my agent, I want my agent to make decisions regarding my mental health care that are consistent with what my agent in good faith believes to be in my best interests. My agent is also authorized to receive information regarding proposed mental health treatment and to receive, review and consent to disclosure of any medical recording relating to that treatment.

This declaration allows me to state my wishes regarding mental health care treatment including medications, admission to and retention in a health care facility for mental health treatment and outpatient services.

(Initial one of the following)

___ This mental health care power of attorney is irrevocable if I am incapable of revoking it.

___ This mental health care power of attorney is revocable at all times.

The following are my wishes regarding my mental health care treatment if I become incapable, as defined in Section 36-3281, Arizona Revised Statutes:

I consent to the following mental health treatments:
